IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-279

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

FLORIDA EAST COAST RAILWAY COMPANY AND
SEABOARD COAST LINE RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court for the Middle District of Florida

MOTION TO AFFIRM OF APPELLEE SEABOARD COAST LINE RAILROAD COMPANY

RICHARD A. HOLLANDER
P. O. Box 27581
Richmond, Virginia 23261
Attorney for Appellee Seaboard Coast Line Railroad Company

Of Counsel:
COX, WEBB & SWAIN
American Heritage Life Building
Jacksonville, Florida 32202

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Appellee, Seaboard Coast Line Railroad Company, hereinafter referred to as Seaboard Coast Line, pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that the questions raised by Appellants are so clearly lacking in substance as not to warrant further briefing and argument.

QUESTIONS PRESENTED

Because of its finding regarding the first of the following issues, the lower court stated that it would "pretermit discussion of all but the first point" from among these questions:

1. Were the parties to the Interstate Commerce Commission proceeding afforded a proper hearing by the Commission;

2. Did the Commission properly consider and apply the provisions of Section 1(14)(a) of the Interstate Commerce Act; and

3. Are sufficient reasons given for the Commission's conclusions, and are those conclusions supported by substantial evidence of record?

STATEMENT

This involves a direct appeal from the final judgment and decree entered on February 18, 1971, by a District Court of three judges specially constituted pursuant to 28 U.S.C. §2284 and §2325 enjoining, annulling and setting aside an Interstate Commerce Commission order, *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, which prescribed incentive per diem rates for a certain type of railroad car.

A. Incentive Per Diem Described

Each railroad in the United States pays a rental charge, called per diem, for the use of any kind of rail car owned by other railroads. The purpose of per diem is to compensate the owning railroads for their car ownership costs.

The proceeding now before this Court relates to *incentive* per diem, which is an additional charge over and above

regular per diem. Its purpose is to give railroads an incentive to promptly move cars and to acquire new ones. As prescribed by the Commission in the disputed decision, incentive per diem would apply to only one kind of car, plain boxcars of the type used by grain shippers.

B. Evolution of the Disputed Commission Order

The Commission's authority to impose incentive per diem is found in Section 1(14)(a) of the Interstate Commerce Act.[1] Congress enacted the pertinent provisions of that Section in 1966 and, later that year, the Commission began an investigation into the possibility of prescribing incentive per diem charges. The following year, on October 3, 1967, it discontinued the proceeding, that being done in *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967), a decision which will sometimes be referred to as "the 1967 decision."

Later in the year, on December 15, 1967, the Commission published a notice requiring all railroads to participate in a study of rail car supply and demand by submitting data in response to a questionnaire. Then, on December 12, 1969, without having held hearings, and with only raw statistical data in hand, the Commission handed down a decision, described as an "interim report," in *Incentive Per Diem Charges—1968*, 337 I.C.C. 183. That decision "announced a provisional judgment with respect to the form and amount" of incentive per diem charges to be added to the basic per diem charges, but the payments were to be applicable only to "plain," or "unequipped," boxcars. The parties were permitted to comment upon the Commission's "interim report" by means of statements or briefs and, on April 28, 1970, the Commission handed down a

[1] Printed in full at pages 3-4 of the Appellants' Jurisdictional Statement.

final order which adopted all of the material "provisional" conclusions reached in its "interim report."

The decision of April 28, 1970, is found in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, and, while it is that decision and order which is the subject of this proceeding, it is founded upon, and is virtually the same as, the "interim report."

That final decision prescribed an experimental plan by which the Commission thought that it might improve the utilization, and the size, of the railroads' plain boxcar fleet through so-called incentive payments.

C. The Action in the Court Below

In June 1970, both the Seaboard Coast Line and the Florida East Coast Railway Company (FEC) filed complaints seeking to enjoin, annul and set aside the order of the Interstate Commerce Commission, dated April 28, 1970, in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217.

Upon motion of the FEC and of the Seaboard Coast Line, which had shown that it would lose some 1.8 million dollars annually because of the I.C.C. experiment, a temporary restraining order was granted. Subsequently, the District Court set aside the Commission's order insofar as it affects the Seaboard Coast Line and the FEC because of the Commission's failure to hold necessary hearings.

In the meanwhile, a United States District Court had handed down a decision related to the Commission's April 28, 1970, order in *Long Island Railroad Company* v. *United States,* 318 F. Supp. 490 (D.C.N.Y. 1970). By stipulation in that case, however, there was only one issue presented, and it had been made quite narrow; that is, the only question before the court was whether, in the absence of the

Long Island's failure to point to "specifics" related to the need for a hearing and since the Long Island did not put the Commission on notice that prejudice would result absent a hearing, the ICC was required to give the Long Island an oral hearing.[2]

D. The Positions of the Parties Here

The Commission urges that the questions are substantial for two reasons; first, that the District Court's decision, if allowed to stand, will disrupt the ICC's car experiment before it has been given a fair trial; and, second, it is urged that the action of the court below conflicts with the related lower court decision in *Long Island*.[3]

The ICC then asks this Court to find that the District Court was wrong in its action because the Appellees are said not to have been prejudiced by the ICC's handling of the proceeding; because the lower court "failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclusions"; and because the District Court "merely admonished the Commission to give 'strict adherence to cherished procedural rights.' " It was proper for the Commission to short-cut those rights, the ICC goes on to argue, because "it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order."[4]

This Appellee replies that whether or not the Seaboard Coast Line was *likely* to have convinced the ICC of its position is not the point. Rather, it was entitled to the protection of its procedural rights, and their denial here, in favor of the Commission's desire to still criticism from

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[2] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 499-500.

[3] Jurisdictional Statement, pages 13-15.

[4] Id., page 15.

Congressmen who were "impatient with delays,"[5] prejudiced both the Seaboard Coast Line and the shipping public which it serves. Thus, the court below was correct in finding that the Commission acted illegally.

The Seaboard Coast Line replies, too, that, insofar as the "substantial issues" urged by the Commission are concerned, they are neither "substantial" nor new. It often has been said by the courts, including this Court, that the ICC must not act arbitrarily, and must follow established procedures; and, as the lower court carefully found here, there is no conflict with the *Long Island* decision.

Further, though the District Court did not reach these issues, the Commission did not properly apply the provisions of Section 1(14)(a) of the Interstate Commerce Act, did not give sufficient reasons for its conclusions, and, particularly, had no substantial evidence of record to support conclusions in the disputed decision which were at complete variance with its conclusions in the 1967 decision.

ARGUMENT

Throughout this entire proceeding, before the ICC and in the court below, this Appellee has taken the position that the Commission failed to give it a proper hearing and that such failure was damaging to it. That position has ample support in law and in fact, and the Commission's unusually lean Jurisdictional Statement avoids all reference to both the applicable law and the pertinent facts. For that reason, a recitation of considerable background material becomes necessary.

A. A Complete Hearing Was Intended

Back in 1966-1967, when it first considered the imposition of an incentive per diem under the then-new Section

[5] Jurisdictional Statement, page 6.

1(14)(a), the Commission held oral hearings, had the benefit of briefs, and even heard oral argument. It did so because it recognized that "all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. §551 et seq." are applicable.[6] Finding that the record did not warrant the prescription of incentive charges, the Commission took care to point out that:

> "Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure. Thus, before we undertake to impose the charge authorized by P.L. 89-430, it is of the utmost importance that little, if any, doubt exist as to its necessity and effectiveness. As a former Chairman of this Commission observed before the Senate Freight Car Shortage Subcommittee in 1965, ' * * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates.' *Hearings on S.179 and S.1098, 89th Cong., 1st Sess., Serial No. 89-23, page 14.*"[7]

The Commission had, in fact, promised the Congress that it "would exercise extreme caution" in using Section 1(14)(a). And, it did exercise such care in the first proceeding; in the 1967 decision. It did not do so the second time. Rather, it acted hastily, under "Senatorial pressure," as Judge Simpson said here,[8] or moved by "Senatorial spurs," as Judge Friendly put it in the *Long Island* decision.[9]

In the beginning, the Commission made it quite clear that it intended to have a full hearing in this case, in-

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[6] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14.

[7] Id., pages 13-14.

[8] *Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 732 (1971).

[9] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 498 (1970).

cluding a pre-hearing conference, an oral hearing in Washington, and, perhaps, regional hearings.[10] The hearings were never held. Instead, the Commission abruptly handed down an order which purported to be an "interim report,"[11] but which, as a practical matter, was the same order in all material respects as the final order, the one under attack here.

Commissioner Bush said, in the "interim report," that while the majority had handled the proceeding "in an expeditious manner," incentive charges couldn't be prescribed "until a hearing has been held as contemplated by statute."[12] Again, no such hearing was held.

This is important. In spite of the fact that the Commission's 1967 decision acknowledged the fact that operating practices would *not* be improved by the incentive charges," a conclusion noted in the "interim report,"[14] the Commission, without any oral hearing, handed down its "interim report" based only upon some railroad-submitted data sheets which did not relate to the question of improved operations and which could not have refuted the earlier conclusion. That statistical material, plus some figures boldly said by the Commission to have been obtained from outside of the record, was used by the Commission in reaching its conclusion to try the incentive method, anyhow.[15]

Upon seeing the surprising "interim report," the Seaboard Coast Line and others sought sufficient time to assess its effect and to comment upon it, but time was denied.[16]

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[10]Notice of Proposed Rulemaking. See Appendix A to this Appellee's Complaint below.

[11]*Incentive Per Diem Charges—1968*, 337 I.C.C. 183.

[12]Id., page 194.

[13]*Incentive Per Diem Charges*, 332 I.C.C. 11, 16.

[14]*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 185.

[15]Id., pages 187-189.

[16]*Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 733 (1971).

The Seaboard Coast Line sought a hearing,[17] and that, too, was denied.

B. An Oral Hearing Was Required

If this Appellee understands the position of Appellants at pages 15 and 18 of their Jurisdictional Statement, the latter chide the lower court for speaking in terms of "cherished procedural rights"; tell this Court that the *Long Island* decision said an oral hearing was not required in this proceeding; and concludes that this Court should overrule the lower court because the ICC should not "waste time on applications that do not state a valid basis for a hearing."

Responding, the Seaboard Coast Line points out that until Congressional pressure was applied against the ICC on behalf of midwestern grain shippers, the Commission, as was shown, had every intention of holding oral hearings at which carriers from each section of the country could express and protect themselves. As the Seaboard Coast Line reminded the Commission upon being served with the "interim report,"[18] as late as March 1969 the present Chairman of the Commission acknowledged that "[t]he statute requires a full hearing for determining whether incentive per diem should be imposed." And the Commission's Chairman told a Senate subcommittee on May 13, 1969, that hearings were yet to be held.[19]

Section 1(14)(a) of the Interstate Commerce Act, under which the Commission has prescribed the questioned in-

[17] Id., pages 735, 736. Also, see *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 219, particularly footnote 2.

[18] *Florida East Coast Railway Company* v. *United States*, 322 F. Supp. 725, 735 (1971).

[19] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 493-494 (1970).

centive charges, states, at the very beginning, that the Commission may not act until "after hearing."

Section 553 of the Administrative Procedure Act (APA) permits the Commission to engage in rulemaking "with or without opportunity for oral presentation" *unless* the proposed rules "are required by statute to be made on the record after opportunity for an agency hearing." If the statute requires a hearing, as does the involved Section 1(14)(a), then Section 553 provides that Sections 556 and 557 of the APA apply instead of Section 553.

Section 556 of the APA provides that, in rulemaking, the Commission may "adopt procedures for the submission of all or part of the evidence in written form" *if* "a party will not be prejudiced thereby." While the Commission went outside of the record here for some of the evidence used in reaching its conclusions, the Commission did use the "written form" approach in that it required the railroads to submit described sampling data. Appellee will show how it was prejudiced by that approach.

First, though, although the lower court did not comment on this point, the Seaboard Coast Line urges that it did not need to show prejudice, however, because Section 556 of the APA also provides that the parties "are entitled" to certain rights, whether they are prejudiced or not, and one of those rights is to "such cross-examination as may be required for a full and true disclosure of the facts."[20] Had the Com-

[20] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 498 (1970), does not agree with this Appellee on that point, but that court failed to consider all of Section 556 of the APA. The only reason why Judge Friendly did not agree with The Long Island Rail Road that, at least, the Commission should have held oral hearings to test the Commission's evidence, was the Long Island Rail Road's failure to have "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony." But, that is not what the APA says; it gives the parties the positive right to cross-examine and to rebut. For example, 2 Davis, Administrative Law §14.15.

mission worked in the open in this proceeding, as it normally does, and had it made the proposed incentive per diem rules available to the railroads for proper study and subsequent cross-examination of those persons responsible for whatever "evidence" was developed by the Commission's staff, it is likely that the Seaboard Coast Line would not be before this Court.

Even if this Appellee does not have a right to cross-examine, its statement to the Commission of March 17, 1970,[21] was specific as to points which it wished to test at a hearing.

The Seaboard Coast Line's argument as to the need for a full hearing clearly could not be said to have surprised the Commission because, in the 1967 decision, after noting that it must "exercise extreme caution," the ICC itself said:

> "There is a substantial difference, however, between the information which warrants the issuance of orders requiring the movement of empty cars to an area of current scarcity and that which will support an order for the payment of funds by and between the respondent railroads. Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 USC § 551, et seq."[22]

This was nothing new to the Commission, for, in acting under Section 1(14)(a) of the Act in the past it consistently afforded oral hearings. In addition to the only other incentive per diem proceeding under the 1966 amendment, there

[21] *Florida East Coast Railway Company v. United States*, 322 F.Supp. 725, 733-737.

[22] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14.

were many such cases under Section 1(14)(a) prior to the amendment.[23]

In two of its decisions[24] the Commission appears to support our definition of the words "agency hearing" as used in Sections 553, 556 and 557 of the APA. At page 606 of *National Trucking* it said:

> "The word 'hearing' is not specifically defined in the procedure act, but it is clear from the manner in which that term is used therein that the reference is to oral hearings only and not to proceedings conducted under the Commission's shortened or modified procedure."

In *Reliance,* it went on to verify the right to test evidence by cross-examination, and then cited two decisions of this Court, *Louisville* and *Morgan.*[25] The Commission took the position in *Louisville* (93) that it could act on data collected by it "even though not formally proved at the hearing." This Court wouldn't agree, saying:

> "But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."
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[23]A few out of many are *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264 (1969); *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.,* 332 I.C.C. 176 (1968); *Increased Per Diem Charge on Freight Cars,* 268 I.C.C. 659 (1947); *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* 248 I.C.C. 109 (1941); *Rules for Car-Hire Settlement,* 165 I.C.C. 495 (1930); *Marcellus & Otisco Co.* v. *N.Y.C.R.R.Co.,* 104 I.C.C. 389 (1925); and *Assigned Cars for Bituminous Coal Mines,* 80 I.C.C. 520 (1923).

[24]*Reliance Steel Products* v. *Baltimore & O.R.Co.,* 291 I.C.C. 695 (1954); *National Trucking & Storage Co., Inc.* v. *Pennsylvania R. Co.,* 294 I.C.C. 605, 606 (1955).

[25]*Interstate Commerce Com.* v. *Louisville & N.R.Co.,* 227 U.S. 88 (1913) and *Morgan* v. *United States,* 304 U.S. 1 (1938).

"The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties."

* * *

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown, but presumptively sufficient information to support the finding."

Later, in its *Morgan* decision (page 14) this Court confirmed the need for "a fair and open hearing" by pointing out:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important govern-

> mental process. Such a hearing has been described as an 'inexorable safeguard.' "

In *Ohio Bell*[36] this Court pointed out, very clearly, that not only is there a right to a fair hearing, but that "[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." Then, citing *Morgan*, this Court said in *Willner*:[37]

> "Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Just why the Commission should have conducted a full hearing in this case, as required, and the mistakes which can result when a major decision such as *Incentive Per Diem—1968* is concocted somewhere within the recesses of the Commission, will be discussed later. First, however, the Seaboard Coast Line requests the Court to consider the Commission's argument that its handling of this proceeding did not prejudice appellees.

C. Prejudice Was Alleged and Shown

Suggesting that a question of first impression might be involved, the Commission urges that the meaning of the term "prejudice" is not known.[38] But, whatever it means, the ICC asserts that the Seaboard Coast Line did not prove

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[36] *Ohio Bell Teleph. Co.* v. *Public Utilities Com.*, 301 U.S. 292, 304-305 (1937).

[37] *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 103 (1963).

[38] Jurisdictional Statement, page 17.

it would be harmed.[29] On the other hand, the Seaboard Coast Line has urged from the beginning that it was prejudiced by the Commission's failure to hold a full hearing. And, the court below, concluding that the factual situation in this case was quite different from that in the *Long Island* problem, agreed that the Seaboard Coast Line and the FEC were prejudiced by the summary procedures of the Commission.[30]

It does not speak well of the Commission to come to this Court and, as a principal basis for its appeal, seriously argue that there is a need to have the Court define the word "prejudice." Its meaning is clear. Corpus Juris Secundum puts it well:[31]

> "As a verb, the word 'prejudice' is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause; to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question." [Reference numbers omitted.]

All of the points noted in that definition apply here, and it cannot be argued earnestly that the above, or other existing definitions, need further refinement.

A party is prejudiced, or aggrieved, when a right is invaded by the act complained of and, as a result, the party suffers a loss.[32] Prejudice under the APA means the ex-

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[29]Id., pages 15-17. For the purpose of this Motion only, Appellee accepts, but does not admit, that it had the burden of proving prejudice. Also, Appellee will not comment in this Motion upon the ICC's own responsibility to consider and avoid prejudicial action.

[30]*Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 728.

[31]72 CJS 481.

[32]*Glos* v. *People*, 102 N.E. 763, 766 (1913).

periencing of undue difficulty in protecting an interest."[33] The test should be whether the complaining party had a fair opportunity to defend its position.[34]

There was no fairness here. As the *Long Island* court pointed out,[35] the facts from which the Commission reached its conclusion were based upon "current data" obtained during "an investigatory-research program" from "sampling procedures developed and administered by our [the ICC's] staff." On the basis of data developed internally, the Commission issued an "interim report," following which, after a decent period of time during which parties were given their only opportunity to comment, it solemnly confirmed its "interim report." In view of the determined way in which the ICC proceeded, perhaps it is true that it was "extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order,"[36] as the ICC now admits to this Court. There was then, and is now little doubt that the "interim report" was to be, in reality, the ICC's ultimate decision. But, even if the ICC had sufficient information upon which to base that "interim report," which it did not have, the Seaboard Coast Line at least was entitled to try to change the Commission's mind, and it was entitled, as it asked,[37] to try to test some of the unexplained conclusions in the "interim report." Without that opportunity it was harmed, or, as the statute says, prejudiced.

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[33]Compare *Deakyne* v. *Commissioners of Lewes*, 416 F.2d 290, 300 (1969).

[34]Ibid.

[35]*Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 493.

[36]Jurisdictional Statement, page 15.

[37]*Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 733, 736.

In many ways this prejudice goes back several years, and it is pertinent, Appellee believes, to consider the Commission's past attitude with respect to car ownership by the railroads.

As the record in this case now shows, several years ago, on April 26, 1962, in Philadelphia, an ICC Commissioner, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "[r]ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, in the very year in which it handed down its "interim decision" the Commission expressed the same feeling when, in speaking of the equipment demands of shippers, it said:

> "The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

> "One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines,

is apparently being ignored. Such a situation we find to be unconscionable and one that must not be continued."[38]

When the then-Chairman of the Commission testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Section 1(14)(a), he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the surprise service of the "interim report," the Seaboard Coast Line had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. Nor had the Seaboard Coast Line been warned otherwise in the first Commission decision under the 1966 amendment to Section 1(14)(a) of the Act. In fact, the Commission emphasized in the 1967 decision that in many respects "the standard boxcar has been replaced."[39]

After the 1967 decision, the Commission commenced a new study leading to the decision which is under attack here. That study consisted of sampling data, only, which the railroads were required to submit to the Commission for an 11-month period in 1968. Based upon that data, as well as material from the Internal Revenue Service obtained from outside the record, and, possibly, other information not known yet to the Appellee, the Commission established the incentive payments which are the subject of this proceeding. This was all done without oral hearings and without any real knowledge on the part of the railroads as to what the Commission was doing. Appellee wanted, but was never

[38] *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C 264, 286, 287 and 290.

[39] *Incentive Per Diem Charges*, 332 I.C.C. 11, 15.

afforded, the opportunity to cross-examine the only persons, Commission personnel, who could be tested as to the sampling data which apparently formed the basis of the ICC conclusions.

Under the Commission's order, the railroads are required to make payments which range upward to $12.98 a day, but the incentive payments are to be made for plain boxcars only. At no time during the course of the Commission's study was the Seaboard Coast Line even aware of the Commission's inclination to restrict the incentive payments to plain boxcars. In fact, in its so-called "interim report," which as a practical matter, was the final order too, the parties, for the first time, learned this fact:

> "We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national boxcar fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues."[40]

So, after telling us in various ways for some time that the railroads should tailor their car fleets to suit the needs of the shippers on their lines, the Commission's order, entered without any effective opportunity to rebute it, penalizes the Seaboard Coast Line for following the Commission's admonition. That is, most of the new cars which the Seaboard Coast Line have acquired have been equipped to meet the needs of its shippers; those cars are boxcars, but they are more expensive to own and more costly to maintain than plain boxcars. Now the Seaboard Coast Line is to be punished because it does not have sufficient unequipped cars of the type which other railroads need to meet the requirements of their shippers. This comes about because

[40] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198.

the Commission's order applies only to unequipped, plain boxcars. When a plain boxcar from another railroad is on the lines of the Appellee, the latter will pay an incentive; when the Appellee's equipped boxcars are on the lines of the other carrier, often performing the same service there as plain box cars, the Seaboard Coast Line receives no incentive in return.

Thus, as a result of the application of this order to a specific type of boxcar only, the Appellee will pay more in incentive charges than it will receive. In fact, it will pay a great deal more. Its damage—its net loss—for the six-month period of each year during which incentive per diem will be in effect will be some $1,850,000.

After the Commission's "interim report" was handed down, the Seaboard Coast Line asked for time in which to assess the effect of the decision, and it sought a hearing to show the harm which the order would cause to its equipment program. Both requests were rejected summarily by the final Commission order, the one now under attack.

It is untrue, as the Commission now has told this Court, that "Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased."[41] The Seaboard Coast Line's statement, to the contrary, clearly told the Commission what was unexplained in its "interim report" and stated some of the things which needed to be tested at an oral hearing.

Regardless of what the Commission now says, had the Seaboard Coast Line had an opportunity to cross-examine, and explore, the reasoning behind the Commission's report and order, Appellee feels that it would have been able to convince the Commission that the record did not support its conclusions. It did not have that opportunity and, thus, it was prejudiced.

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[41] Jurisdictional Statement, page 8.

The principal mistake made by the Commission in its order, that is, the conclusion that boxcars would be returned quicker to the owning lines if some incentive over the basic per diem could be applied, would have been avoided had there been a hearing. This Appellee can make that statement in a positive manner because there is nothing in the Commission's record to support the Commission's conclusion. Indeed, so far as Appellee is aware, most, if not all, of the evidence of record is to the contrary. Any hearing would have developed the fact that incentive charges could not induce the Seaboard Coast Line to return cars faster than it does at present.

When the Seaboard Coast Line asked the Commission for a hearing in its statement of March 17, 1970,[42] it pointed out that the Commission's "interim report" had expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars." Appellee has been diligent in acquiring equipment to meet the needs of its shippers, and is a creditor road, yet the Commission's order will penalize the Seaboard Coast Line and will not send to it any "flow of funds." Instead, when it had its only opportunity to comment upon the "interim report," the Seaboard Coast Line pointed out that its necessarily-hasty study showed that it will lose "in excess of $1.5 million each year as a result of the Commission's 'experiment,' to the detriment of its car supply program." As soon as the Seaboard Coast Line's studies were completed, it learned that its annual loss would be in the amount of $1,850,000. The Commission's mistaken belief that such a creditor line as the Seaboard Coast Line would benefit from any "flow of funds" could have been avoided if the usual safeguards had been

[42] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 735.

taken. We cannot believe it "unlikely" that the Commission's conclusions would have been different if someone at the ICC had been tested on cross-examination about that vital point.

Further, it is clear from a reading of the Commission's decision that shipper and carrier interests in the Southeast (that part of the country referred to by the Commission in its report as Zone 3) received no real consideration in this proceeding. As we already have pointed out, the Commission confined itself to the plain boxcar needs of the Midwest, acknowledging that "problems in other areas may well be as severe," but concluding that it would continue its study in the other areas until some other time.[43] The Seaboard Coast Line very carefully called the Commission's attention to that flaw, and Appellee was prejudiced by the fact that the Commission overlooked it in its final treatment of the problem. Since the Commission would have had to face careful examination on that point at an oral hearing, Appellee asserts that the lack of such a hearing on a point about which only the ICC's representatives could answer questions, was damaging to the Seaboard Coast Line. That failure would have been remedied by a full hearing. And, it is not enough for the Commission to suggest that it will conduct some future study insofar as other railroads are concerned because, while that study is going on, the Seaboard Coast Line's car supply program will suffer and its financial position will be eroded.

As Appellee told the Commission in its Statement of Position, the lack of time and proper hearing placed us "before the Commission without a real chance to present detailed verified statements."[44]

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[43] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198. By "other areas" the Commission appears to mean "other types of car."

[44] *Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 733.

Then, although its 1967 decision emphasized the fact that "[s]hipper need, demand and acceptance with respect to future equipment is a significant factor" to be considered, and that there should be "a thorough analysis of services" desired by shippers,[45] the ICC here refused Appellee's request that evidence of shipper needs be brought before the Commission.[46]

If then, as the ICC argues, it is necessary that Appellee show that it was prejudiced by the procedure followed by the Commission, ample damage was shown to the Appellee at each juncture of the Commission proceeding.

D. There is No Conflict with Long Island

As to one of the two "substantial questions" said to have been raised by the decision under attack, the Appellants say that: "The decision of the Florida court is in basic conflict with the decision of the New York Court in Long Island Railroad Co." and that this Court "should resolve the conflict for the guidance of the Commission and other agencies ***."[47]

This question illustrates the slim reed which supports the Commission's presence before this Court.

The lower court in *Long Island* noted that the incentive per diem question had come to it on a restricted stipulation related only to procedure.[48] It agreed with the Long Island Rail Road that "the third sentence of §553(c) [of the APA] was applicable," thus also agreeing that an oral hearing and cross-examination is required except that the ICC may, to

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[45] *Incentive Per Diem Charges,* 332 I.C.C. 11, 14-15.

[46] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 736.

[47] Jurisdictional Statement, page 14.

[48] *Long Island Railroad Company* v. *United States,* 318 F.Supp. 490, 491.

use the language of §556(d), "adopt procedures for the submission of all or part of the evidence in written form" if "a party will not be prejudiced thereby."[49]

The District Court in New York then went on to say that:

> "If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal."[50]

The New York court said, further, that:

> "* * * we fail to see that prejudice has been established."[51]

And, beyond that, it said that other questions:

> "* * * are not before us in light of the stipulation of the parties limiting the issues."[52]

The New York court concluded:

> "Our sole task is to determine whether under all the circumstances the denial of an oral hearing significantly prevented the Long Island from fairly presenting its case."[53]

Turning, now, to the Jacksonville court which heard the proceeding before this Court, it looked carefully at "the able

[49]Id., pages 497-498.
[50]Id., page 499.
[51]Id., page 500.
[52]Ibid.
[53]Ibid.

opinion" of the New York court which had "concluded that the plaintiff railroad had shown no prejudice from the procedures utilized by the Commission," and concluded that "the facts of the instant case fall within the exception expressed in *Long Island*."[54] It went on to say that the facts here, which it heard in detail, "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission."[55]

The New York court said that prejudice should be shown, and that the Long Island Rail Road had not done so. The Florida court said that prejudice should be shown, and that it had been shown by the Seaboard Coast Line and the FEC. There is, then, no conflict.

E. The Commission's Experiment Has Not Been Disrupted

On page 5 we noted that the Jurisdictional Statement raised two "substantial questions," one being that there was a conflict below with *Long Island*. Appellee believes it has shown that there is no conflict. The second "substantial question" which was raised relates to the ICC's argument that "the decision below threatens to disrupt the entire national plan before it has been given a fair trial."[56]

The Commission makes that statement, but it never tells this Court why its "experiment" will be disrupted. The reason why it fails to follow through is the fact that the incentive per diem trial continued to operate through the entire planned 1970-1971 period as to all railroads except the two Appellees. There was no disruption.

In any event, the Commission has no right to try out a costly experiment which can harm the transportation sys-

[54] *Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 728.
[55] Ibid.
[56] Jurisdictional Statement, pages 13-14.

tem, as well as individual carriers, without evidence, properly tested, that such a plan is just and reasonable.

F. The Commission Failed to Comply with §1(14)(a) Requirements

The lower court passed over this issue in its consideration of the Commission's decision because it found the ICC to be wrong in its procedural handling of the case. We renew the point.

Because the Commission limited its consideration in this proceeding to plain boxcars while acknowledging that "problems in other areas may well be as severe,"[57] and because it refused to attempt to resolve related issues concerning the national freight car supply,[58] this Appellee has urged that the ICC ignored the requirements of Section 1(14)(a) of the Interstate Commerce Act.

The Commission recognized the limitations of Section 1(14)(a), and its own responsibility in acting under that provision of the Act, in its 1967 decision. It said:

> "Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and

[57] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 198. By "other areas" the Commission appears to mean "other types of car."

[58] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 223.

improvements have taken place in car design and operation."

* * *

"Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor."[59]

Under pressure from Congress those responsibilities, and those factors, recognized in 1967, were sidetracked here.

i. The Order Is Arbitrary, Not Reasonable.

The very first admonition of Section 1(14)(a) is that any prescribed rule, regulation or practice must be "reasonable." The requirements prescribed in the decision now under attack are considerably less than reasonable, a fact which could have been made plain to the Commission had a hearing been conducted. Appellee sought to be heard for,

[59] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14-15.

among other reasons, the purpose of explaining to the Commission why its rules would be harmful to the railroad and why, in turn, they would result in a worsening of the car supply situation with respect to Seaboard Coast Line shippers. It was not reasonable for the Commission to give "first priority to the boxcar"[60] without giving consideration to all types of boxcars, many varieties of which serve the same purpose. Indeed, the Commission made that clear in its 1967 report.

Nor did the Commission give consideration to the "services currently desired by the shipping public" in the Southeast, or to "the interplay of a number of factors" of which it spoke in its 1967 decision. Instead, it handed down an arbitrary requirement which failed to consider other than a limited number of factors.

Then, Section 1(14)(a) requires that any rule with respect to "the compensation to be paid" also must be reasonable. Although this Appellee questioned the scale of incentive charges prescribed by the Commission, the ICC has yet to indicate that the various levels of incentive charges are based upon good reason. We are, of course, pleased that the Commission recognizes that the level of the charges is questionable and that the proceeding will remain open for new information as experience is gathered,[61] but the Commission's conclusion clearly is not reasonable. It is not enough to say that the charges are placed at the present arbitrary level in order to give owners of unequipped boxcars "returns on investment * * * comparable to the higher average returns earned by non-regulated corporations."[62] Aside from the fact that the Commission stated that it reached this conclusion on untested data from beyond the

[60]Ibid.
[61]*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225.
[62]Id., page 224.

record, there can be no good reason why investments in unequipped boxcars should receive higher rates of return than those in equipped boxcars or in other types of rail equipment.

ii. The National Car Supply Was Not Considered.

Section 1(14)(a) requires that the Commission "give consideration to the national level of ownership of such types of freight car *and* to other factors affecting the adequacies of the national freight car supply." The Commission gave consideration to the "level of ownership" of a type of freight car, plain boxcars, but it did not do so on a "national level." For example, in reporting the results of the freight car study which it had conducted, the Commission indicated that it had studied only zone 2 and zone 4 carriers.[63] Appellee is primarily a zone 3 carrier, and little, if any, consideration was given to its territory. The national level was not even considered so far as we can determine from the Commission's decision.

iii. Other Necessary Factors Were Not Considered.

There was another very important omission by the Commission. The statute requires not only that the ICC consider the national level of ownership of—in this case—plain boxcars, but it also must consider "other factors affecting the adequacy of the national freight car supply." Proper consideration was not given to such "other factors," particularly to the impact of the new Commission requirements on the supply of equipped boxcars or on other types of equipment. And, there was no thought given to "the extent to which the transportation service [one type of car performs] is or can also be provided by cars of other types," to use the Commission's words from its 1967 decision.

[63] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 198-202.

Then, the last sentence of Section 1(14)(a) appears to require that the Commission shall apply incentive charges to all types of freight cars unless it finds certain types to be adequate. The Commission seeks to meet that requirement of the Act by saying, only, that "[r]ailroad cars other than boxcars are not here found to be in short supply."[64] Other than that, there is no specific finding by the Commission. Nor could the Commission make one; for, as it said, consideration was given only to plain boxcars. And, it admits that its study is incomplete, saying that it must in the future look to see whether other types of freight cars are interchangeable with plain boxcars.[65]

iv. The Commission Ignored Its Own Views of the Involved Statute.

To summarize, it is clear that the Commission used Section 1(14)(a) as a vehicle for meeting Congressional, and other, complaints with regard to a limited problem. It failed to take a national viewpoint, and it ignored the effects of its rules on the freight car supply in other segments of the country. Indeed, it ignored its own 1967 admonition:

> "Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously."[66]

Because the Commission did act capriciously, and because the order under attack does not comport with the require-

[64] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 228.
[65] Ibid.
[66] *Incentive Per Diem Charges*, 332 I.C.C. 11, 16-17.

ments of Section 1(14)(a) of the Act, it might well be set aside by this Court for reasons other than those announced by the court below.

G. There are Neither Reasons Nor Findings Sufficient to Support the Commission's Conclusions

This is another of the Seaboard Coast Line's grounds for reversal which the lower court found unnecessary to consider.

Some years back, this Court said, in *Louisville*,[87] that:

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' "

That has been a consistent requirement throughout the years. It was made clear in *Burlington* and this Court went on to state that:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "[88]

There are a number of conclusions in the Commission's report which are not, and cannot be, supported by either reason, evidence or findings of record.

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[87] *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 92 (1913).

[88] *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962). Also, annotation references 2 and 3 in the *Burlington* decision as reported in 9 L.Ed. 2d 207. Particularly strong is *Aberdeen and Rockfish Railroad Co.* v. *United States*, 270 F.Supp. 695 (1967), *aff'd. Baltimore & O.R.Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87 (1968), and *Palmer* v. *United States*, 75 F.Supp. 63, 75-76 (1947).

It has been said, correctly, that:

> "It is not enough that some suggestion of a reason should 'lurk' in the Commission's report; a reviewing court cannot uphold an order on a ground which the Commission has not made sufficiently plain that the court can be sure the Commission meant to act upon it and had a factual basis for doing so."[69]

The most glaring error in the Commission's entire decision relates to the principal objective of incentive per diem charges, it being the purpose of those charges to spur the railroads into returning boxcars to the owning lines as quickly as possible, and to the Commission's failure to make clear why it now has reversed its 1967 conclusion in that regard.

i. Incentive Charges Will Not Improve Operating Practices.

In its 1967 report, the Commission made clear that it was "not satisfied, on this record, that addition of an interim incentive charge" would have such an impact as to improve present operating practices.[70] Later, it acknowledged that conclusion in the proceeding now being considered.[71] Nevertheless, without any facts of record to bolster its new conclusion, and without stating in the decision its support for the conclusion, the Commission turned itself about and surmised that incentive per diem "should tend to speed up the use and movement of cars."[72] If, as we charge, this conclusion of the Commission cannot be supported by evidence of record, then the entire order must fail because its underpinnings are gone and it will serve no reasonable

[69] *New York Central Railroad Co.* v. *United States,* 207 F.Supp. 483, 496 (1962).

[70] *Incentive Per Diem Charges,* 332 I.C.C. 11, 16.

[71] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 185.

[72] Id., page 186.

purpose. Rather, it will only take money from the paying railroads and give it to the owners of plain boxcars, all to the detriment of the users of equipped boxcars and other types of rail equipment.

This Appellee is of the opinion that all of the evidence of record on this subject now before the Commission requires a conclusion that incentive per diem charges will *not* improve the operating practices of the railroads. If this is correct, that is, if the evidence indicates that the disputed incentive charges will not serve the purpose for which they are prescribed, then the order cannot stand.[73]

ii. The Charges Will Unduly Burden the Seaboard Coast Line.

The Commission figured that its proposal was worth trying because, after all, "the proposed charges would [not] impose an undue burden on [any railroad opponent] or on any group of carriers."[74] This conclusion is not, and cannot be, supported.

Although the Seaboard Coast Line was not given an opportunity to show the full scope of the loss which it would experience, it did give evidence that it would lose "in excess of $1.5 million" for each 6-month period that the disputed scale of charges is in effect. Other railroads, including the FEC, showed that the proposed charges would be harmful. Regardless, of the showing made by others, the loss which will be experienced by this Appellee constitutes an "undue burden," and any conclusion to the contrary is faulty and without support.

In its only direct response to any Seaboard Coast Line objection, the Commission said that the Seaboard Coast

[73] *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934).

[74] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 224, footnote 8.

Line is not going to be penalized for owning better boxcars because it will receive a greater basic per diem rate "when its equipped, expensive, and more modern boxcars are on other lines." "It," said the Commission of the Appellee, "overlooks the scale of basic per diem charges, which provide larger per diem payments for the more modern and more expensive cars."[75] This is a most inexpert response for an expert agency to make, for the Commission knows that basic per diem is based upon ownership costs; incentive per diem is not. Whether we're considering 40-year old, plain boxcars or brand new equipped boxcars, basic per diem returns to the owner of either kind of car only enough to meet its ownership costs. Incentive per diem is something else; it's an additional charge over and above the basic per diem rate. The Seaboard Coast Line won't receive incentive per diem for its more expensive cars, but the owners of plain boxcars will. Thus, when the netting out of interline accounts takes place, the Seaboard Coast Line will come up short—because of the Commission's order—some $308,333 each month, or, $1,850,000 at the conclusion of each six-month period.

Aside from the hoped-for improvement of operating practices, the only other stated purpose of the incentive charges is to penalize railroads which will not buy sufficient quantities of plain boxcars and give funds to creditor railroads which do buy them. The Commission said that the incentive charges will "produce a steady annual, although not perennial, flow of funds to the creditor per diem railroads with which they can purchase additional plain boxcars."[76] Our answer to the Commission was, and is, that the Seaboard Coast Line, acting in conformity with prior demands of the Commission and of good business practice, has been

[75]Id., pages 223-224.
[76]*Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 186.

diligent in acquiring equipment to meet the needs of its shippers; and it is a creditor road. At the only opportunity given to it, the Commission was told these things by this Appellee." Clearly, then, the Commission's conclusion is wrong, for the Seaboard Coast Line, a creditor road, will be penalized and will not be the beneficiary of any "steady annual * * * flow of funds."

Equally erroneous is the Commission's conclusion that "the incentive charges should bring distinct economic benefits." There is something wrong with this statement on its face, because Appellee is going to have some $1.85 million lifted from its pockets each year. So, obviously the conclusion is incorrect insofar as the Seaboard Coast Line is concerned. Nor can the finding be propped up by the extra-record support of some data obtained by the Commission from the Internal Revenue Service, as the ICC has tried. Without doubt, some railroads will experience "distinct economic benefits" as a result of the order; others will not.

Further, shippers in Seaboard Coast Line territory will suffer. The railroads of the Midwest, which need the plain boxcars for their shippers, will, under the Commission's incentive plan, receive the "distinct economic benefits" of which the ICC wrote. That is, they will obtain additional plain boxcars, those cars being paid for by the Seaboard Coast Line, among others. Since the latter must buy plain boxcars for other railroads, it must, naturally, reduce its expenditures for new cars needed by its own shippers. This is the kind of "interplay" which was so important to the Commission in its 1967 decision, but which, in its haste, it forgot in 1970.

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[11] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 733-736.

[12] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 190.

iii. The Commission's Study is Incomplete.

The decision under attack states, strangely, that "[t]he critics of the [1968] study point to no specific weakness in it."[79] This conclusion of the Commission is wrong. At every opportunity—at the beginning, in the middle, and at the end of the study—this Appellee did criticize the study as being inadequate. As noted earlier, the Commission failed to take into consideration the Southeastern States, the needs of shippers in that territory, and the type of boxcar equipment used by rail customers there. Very important, it did not consider, as it once said it must, that equipped boxcars often are used interchangeably with plain boxcars. And, in sum, it did not heed its own previously mentioned 1967 admonition that its "[c]onclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program." In fact, the only real objective of the Commission's study here was "to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand."[80] Numbers, not reasons, were studied. And, numbers cannot support the Commission's conclusions in this proceeding.

iv. The Commission Ignored Material Objections.

Then, the Commission concluded that, for the most part, those parties critical of its order, "do not raise material or substantial allegations of error in that report."[81] The facts are to the contrary. It would be safe to say that virtually all of those critical of the decision raised "material allega-

[79] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 221.
[80] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 197.
[81] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 220.

tions." Certainly, this Appellee did. Its allegation of substantial harm is quite material, yet it was brushed aside for the clear purpose of rushing the Commission's "experiment" into practice.

v. The Level of the Charges Has No Support of Record.

An important aspect of the Commission's decision is its treatment of the level, or amount, of the incentive per diem charges. Although it finds "that the 1968 study provides us with adequate data to support the action taken in this report and order,"[82] the Commission confesses that the order is only a "tentative approach to the appropriate amount of incentive."[83] The method by which the Commission arrived at this "tentative approach" is described in the "interim report," the Commission being quite candid in stating that the basis for its conclusion is extra-record data collected by the Internal Revenue Service showing the profitability of corporations generally in 1966.[84] Aside from the fact that the Commission has gone beyond the record, the "tentative" charges bear absolutely no relationship to the proper levels necessary to meet the Commission's objective. The Commission's approach does not take into consideration the needs of all of the carriers, and it will lead to unnecessary, irreparable harm to some railroads. The Seaboard Coast Line brought this to the Commission's attention at the only opportunity which was given to the parties, but the Commission's only response was that it would wait until after "actual experience" before it would "determine the precise effect" of the decision.[85] That comment is not such "substantial evidence" as will support the far-reaching, damaging results of the order. Furthermore, the Commission's

[82] Id., page 223.
[83] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 187.
[84] Id., page 187-189.
[85] *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 225.

statement flies directly in the face of its earlier conclusion that "before we undertake to impose the charge * * *, it is of the utmost importance that little, if any, doubt exists as to its necessity and effectiveness."[86]

CONCLUSION

As Appellee said on brief below, the Seaboard Coast Line realizes that the Commission has been faced with much unfounded criticism with respect to car supply problems. And, we can appreciate fully the impact of Congressional pressure on the Commission. Still, as the court below pointed out, "procedural shortcuts" are not the answer. Too often they lead, as here, to unfair, unsupported and unreasoned conclusions of the type this Appellee has just described.

The lower court considered carefully the procedural issue, and there has been given to this Court no real indication by the Appellants of substantial need for further argument. This Motion to Affirm, accordingly, should be granted.

Respectfully submitted,

RICHARD A. HOLLANDER
P. O. Box 27581
Richmond, Virginia 23261
Attorney for Appellee
Seaboard Coast Line Railroad Company

Of Counsel:
COX, WEBB & SWAIN
American Heritage Life Building
Jacksonville, Florida 32202

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[86] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14.